# Submission on

# DNA Data Bank Legislation Consultation Paper

NATIONAL CRIMINAL JUSTICE SECTION
CANADIAN BAR ASSOCIATION

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# PREFACE

The Canadian Bar Association is a national association representing over 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved by the Executive Officers as a public statement by the National Criminal Justice Section of the Canadian Bar Association.

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## INTRODUCTION

The National Criminal Justice Section of the Canadian Bar Association (CBA Section) is pleased to have this opportunity to respond to the Department of Justice Consultation Paper, *DNA Data Bank Legislation* (Consultation Paper). The CBA Section is comprised of both prosecutors and defence counsel from across Canada. The CBA's mandate includes seeking improvements in the law and in the administration of justice, and it is with that mandate and balanced perspective that we develop our proposals for law reform.

The CBA Section has previously considered the issues raised in the Consultation Paper. In 1996, we responded to legislative proposals then under consideration with our submission called *DNA Data Banking*. We appreciate being consulted about the issue again prior to the government's proposed three-year review of that legislation. We have reviewed the current Consultation Paper in keeping with our previously taken positions and recommendations.

Our 1996 submission highlights three general principles which we will reiterate before addressing the specific questions raised in the Consultation Paper:

- inclusion in a DNA database is an intrusion into both the bodily integrity and privacy of an individual. Of these intrusions, the more significant is the privacy intrusion through state retention of the information contained in the DNA sample. We must be extremely careful when considering expanding the list of designated offences where DNA sampling is

permitted, or in the retrospective reach of the legislation. Such an extension should only be considered on the basis of compelling evidence.

- the right of privacy is a significant interest which should be abrogated to the narrowest extent consistent with demonstrably justified objectives. Where, as with this consultation, there are ambiguities or uncertainties as to the actual extent of a problem or the impact of a proposed solution, the issue should be resolved in the manner most consistent with the right of privacy.

- a DNA data bank can be a significant tool for achieving justice. Portions of the scheme may need to be attenuated to ensure that it functions effectively both as a tool gathering inculpatory evidence, but also to appropriately eliminate suspects thereby safeguarding against wrongful conviction or other miscarriage of justice.

**Issue #1: Is there a need to amend the current lists of designated offences in s. 487.04 of the *Criminal Code*?**

In our 1996 submission, the CBA Section recommended that to "balance the privacy interests at stake with the need to protect society from crime, the DNA data bank should exist only for homicide and serious sexual or violent offences, including breaking and entering and committing a sexual offence."[1] We suggested that the proposed list of designated offences was too broad and some of the offences included were insufficiently serious to justify the seizure of bodily substances.[2] Our current perspective on the 2002 Consultation Paper is guided by those previous policy statements and recommendations.

The CBA Section recommends that no new offences be added to the list of designated offences, with one exception. Following the passage of anti-terrorism legislation in 2001, terrorism offences were added to the list of primary designated offences for the DNA data bank scheme. For the sake of consistency,

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1 National Criminal Justice Section, *DNA Data Banking* (Ottawa: CBA, 1996) at 5-6.

2 *Ibid.,* at 5.

we suggest that consideration be given to the addition of criminal organization offences. However, those offences should be added to the list of secondary designated offences, allowing for judicial discretion. They include drug offences, for example, which do not justify obtaining a DNA sample for data bank purposes.

None of the offences currently on the list of secondary designated offences should be moved to the primary designated offences list. However, the following primary designated offences should be moved to the secondary designated offences list:

- assault with a weapon or causing bodily harm (s.267), and
- unlawfully causing bodily harm (s.269).

Factual circumstances regarding these offences vary widely. Moving them to the secondary list will allow judges discretion to balance individual circumstances with the need to protect society in more aggravated situations. For example, a bar room fight that is sufficiently serious to result in a conviction for assault causing bodily harm may be insufficiently serious in the particular circumstances to warrant seizure of a bodily substance.[3] Currently, a sample must be taken for conviction for either a s.267 or a s.269 offence, even though many of those cases will represent the only encounter an offender ever has with the criminal justice system. The consequent risk of future violence may be so low that the invasion of privacy of that individual greatly outweighs any future risk to society. In other words, the circumstances of the offence and offender are insufficiently serious to justify seizure of the offender's bodily substance. Moving these offences to the list of secondary designated offences may also alleviate concerns about unnecessary sampling of convicted offenders and enhancing cost-effectiveness in the operation of the national DNA data bank.

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[3] See, for example, the reasoning in *R. v. De Paz Pichinte* [2002], B.C.J. No. 2068 (B.C. Prov. Ct.).

**Issue #2: Is there a need to amend the *Criminal Code* to allow DNA samples to be taken from individuals found to be not criminally responsible by reason of mental disorder for inclusion in the DNA Data Bank?**

This issue raises complex and competing concerns about the need for public protection and the need to protect those not held morally blameworthy because they were mentally incapacitated at the time they committed an offence. Although such accused are found to have actually committed the offence, the law determines them not to be guilty because their mental illness precludes formation of the requisite mental element for a conviction. Some persons found "Not Criminally Responsible by Reason of Mental Disorder" (NCRMD) will eventually recover from the disorder that prevailed at the time of the offence. If the person recovers sufficiently to receive an absolute discharge, there should be no remaining sanction.

Under s.672.35, an accused found NCRMD is not guilty of the offence and under s.672.36, will not be considered as having a previous conviction for the purpose of any offence under any Act of Parliament. The CBA Section believes it is important that we draw and maintain this "bright line", requiring a conviction to qualify for inclusion in our seizure regime and the DNA data bank scheme. We have grave concerns about protecting the rights and liberties of these often shunned and misunderstood, yet vulnerable members of society. Perhaps the dual use of the data bank as both an investigative and exclusionary tool may warrant consideration of segregating NCRMD entries for a more limited use, such as solely for exclusion from suspicion of guilt.

In spite of this position, we acknowledge that competing interests clash forcefully when the accused person has committed a very serious and violent offence, such as murder or sexual assault of an aggravated and invasive nature, and represents an ongoing threat. In such circumstances, public protection may well demand

that special measures be taken, including obtaining a DNA sample from the accused.

How we deal with accused persons designated NCRMD at the time they committed an offence may need to be reconsidered as a result of revolutionary changes in law and technology over the past century. The treatment of offenders found to be NCRMD has changed considerably since the insanity defence evolved in the English common law through the rule in *McNaughten's case*[4]. Until fairly recently, insanity defences were relatively limited and usually advanced only in the most serious of cases. Even when successful, an insanity defence usually meant a lifetime of "incarceration" in a mental institution, with little chance of eventual release.

Since the Supreme Court of Canada's decision in *R. v. Swain*,[5] sweeping changes have occurred in the treatment of an accused found NCRMD. There has been a marked shift from institutionalization to deinstitutionalization. Indeed, under s. 672.54 of the *Criminal Code,* there is now a presumption of imposing the least onerous and least restrictive disposition on the accused consistent with protecting the public from dangerous persons, the mental condition of the accused and the need for reintegration of the accused into society. As a result, potentially dangerous individuals may be released into the community, though probably subject to conditions. While in theory these individuals are generally released to be supervised by community mental health and related services, there may be legitimate public safety concerns because of the notoriously inadequate funding of those services.

Before concluding that DNA samples must be more broadly obtained in this context, we strongly recommend very comprehensive and careful consultation, discussion and examination of this complex and critical issue. If, after such

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4 *M'Naughten's Case* (1843), 10 Cl. & Fin. 200.

5 [1991] 1 S.C.R. 933, 63 C.C.C. (3d) 481.

study, it was determined that samples for the DNA data bank should be obtained from accused found to be NCRMD, we recommend, consistently with our 1996 position, that only homicide and serious sexual or violent offences should be included. Further, the onus should always be on the Crown in these limited circumstances and the offences should be part of the list of secondary designated offences for which a discretionary order may be obtained. When asked to make such an order, judges should consider the same criteria as that currently listed in s. 487.051(1)(b) & (3) of the *Criminal Code.* In addition, they should give careful consideration to future risk presented by the offender and its impact on public protection under the circumstances.

**Issue #3: Is there a need to amend the *Criminal Code* to expand the scope of the "retroactive" aspect of the DNA data bank legislation?**

The CBA Section opposes further expansion of the retroactive scheme of the legislation to include additional historical sexual offences or other offences. This exception was intended to be very carefully limited out of respect for one of the most fundamental principles of our criminal justice system - that the state cannot impose ongoing consequences on an offender once already sentenced. As recognized in the Consultation Paper at page 11, contravening that principle is only justified in very limited cases where there is a heightened risk of re-offending by committing a serious violent offence.

Absent compelling evidence that the currently omitted offences are those where there is such a heightened risk of re-offending with a serious violent crime to the extent that inclusion is absolutely required for public protection, the list of offences within the retroactive scheme should not be further expanded.

**Issue #4: Is there a need to amend the *Criminal Code* to address certain procedural issues?**

Under current law, it may be permissible to get an offender back before the court to make a DNA data bank order after a sentence has been imposed where the offender is sentenced to probation or conditional sentence. Such offenders are required to attend before court as and when directed to do so, under ss.732.1(2)(c) and 742.3(1)(c). A comparison of s.109 and s. 487.051 of the *Criminal Code* may support the proposition that a judge does not lose jurisdiction once sentence is imposed for purposes of making a DNA order. If so, an application could be made by the prosecution with notice to the offender, assisted through the offender's conditional sentence order supervisor or probation officer, directing the offender to appear, or a summons could be issued under this provision. If the offender was in custody, then a spring order could be done on application by Crown.

We question the need for a legislative amendment. If a particular jurisdiction is experiencing a problem in this regard, is it because DNA orders are being seriously contested by defence and long hearings are being held or because the Crown is not making an application in a timely fashion or is failing to bring it to the sentencing judge's attention? Unnecessarily making such an amendment could actually encourage applications to be extended or delayed, rather than addressed in a timely fashion. There is no similar mechanism for a situation where a court overlooks making a mandatory firearms prohibition order under s. 109, and we see no justification for providing one in this context.

Amending the *Code* to establish a process for compelling the attendance of an offender for the purposes of providing a DNA sample may have some merit. For those small jurisdictions without on-site facilities or trained personnel to take the sample immediately, clients should be directed to attend at a named location, date

and time soon following sentence. Properly limited, the amendment should ensure that persons are not needlessly held in custody or kept waiting to give samples.

This should, however, be an exception to the ordinary rule of taking the sample at the time it is imposed, and some evidence or submissions should be presented to satisfy a judge that it is necessary in the circumstances. Where the judge is satisfied on a balance of probabilities that such an order is necessary, then perhaps a process similar to obtaining fingerprints and print warrants could be employed. There should also be a requirement to obtain the sample in an expeditious fashion once the person is arrested and detained so that he or she is not detained in custody for extended periods of time waiting for a sample to be taken.

The CBA Section opposes a legislative amendment requiring an offender to provide a subsequent sample because the state made errors or omissions in the process of obtaining the initial sample. Significant rights to privacy, security of person's bodily integrity and right not to be subject to state interference are engaged in requiring a person to provide a sample in the first place. Permitting a "slip" rule may simply encourage less vigilance in execution of paperwork. If an error occurs in a case where the offender represents a significant danger to the public, there could be a limited exception for re-sampling. Such an exception should require application by the prosecution with notice to the offender, and only be permitted if it is shown that the interests of justice and the protection of public would be unduly imperiled by not permitting the re-sampling.

**Issue #5: Is there a need to provide for re-sampling in some cases where access to the offender's DNA profile has, by operation of law, been permanently removed from the national DNA data bank?**

Under the current law, a DNA sample would be permanently removed from the data bank following a successful appeal of conviction. If, pending that appeal, the offender was convicted of another offence, no sample would be taken because of the existence of the sample then present in the data bank.

We support an amendment to address such a situation. The solution may be to allow a provisional order to be made by the trial judge who convicts on the subsequent designated offence. Collection could then occur only upon successful conclusion of the appellate proceedings in respect of the first designated offence. The trial judge who heard the proceedings and sentence submissions can make the determination about an order where it is warranted, and only collection would be delayed.

## CONCLUSION

While the CBA Section recognizes the utility of a DNA data bank, we know from past experience that, once an intrusion of this sort is permitted, it is very rarely retracted or curtailed. More often, it is extended to justify similar sorts of measures in other contexts undeserving of them. Therefore, we urge the government to consider any expansion of this law with the utmost caution.